BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLTON WALKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,948
SYSTEMS MATERIAL HANDLING CO., INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

This case is before the Appeals Board on remand from the Kansas Court of Appeals in a case not designated for publication, No. 78,153.

ISSUES

The November 27, 1996, Appeals Board Order awarded claimant a 71 percent work disability based upon a 41.5 percent task loss and a 100 percent wage loss. That Order was appealed to the Kansas Court of Appeals which, in an unpublished opinion filed May 15,1998, affirmed the task loss finding but remanded the case to the Appeals Board with directions in regard to the 100 percent wage loss finding. The nature and extent of claimant's disability is the only issue before the Appeals Board.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Administrative Law Judge's July 24, 1995, Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, the Appeals Board finds as follows:

The Kansas Court of Appeals remanded this case to the Appeals Board with directions to make factual findings on the following issues: (1) whether the respondent

offered claimant accommodated employment; (2) whether claimant attempted to perform the accommodated employment; and (3) whether claimant made a good faith effort to find appropriate employment.

Claimant injured his neck and upper back on December 15, 1993, while employed by the respondent. Therefore, claimant's entitlement to permanent partial disability benefits is based on the July 1, 1993, version of K.S.A. 44-510e. That statute generally provides that an injured employee is eligible for a work disability if the employee is not earning wages equal to 90 percent or more of the average gross weekly wage the employee was earning at the time of injury. The work disability test contains two components. The first is the loss of a worker's ability to perform work tasks the worker performed in employment in a fifteen-year period next preceding the accident. The second component of the work disability test is the difference between the wage the worker was earning at the time of injury and the wage the worker is earning post injury. Both of those components are then required to be averaged together to arrive at a work disability. *See* K.S.A. 44-510e(a).

The Kansas Court of Appeals held in a case involving the pre-1993 work disability test, Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), if an injured worker refuses to even attempt to perform an accommodated job offered by the respondent, a post-injury wage shall be imputed to the worker. The principles announced in Foulk were applied to the 1993 work disability test in the case of Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). The Court of Appeals held in that case that "[p]ursuant to K.S.A. 44-510e(a), if a finding is made that a good faith effort has not been made to find appropriate employment, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." Copeland, 24 Kan. App. 2d 306, Syl. ¶ 8.

On remand, the Appeals Board will first address whether the respondent offered claimant accommodated employment that claimant unreasonably refused to even attempt to perform. Respondent voluntarily provided claimant with temporary total disability benefits and medical treatment for claimant's December 15, 1993, work-related accident. Claimant's treating physician, orthopedic surgeon Don B. W. Miskew, M.D., determined claimant had met maximum medical improvement on May 25, 1994. Dr. Miskew released claimant from his treatment indicating claimant had met maximum medical improvement but suffered no permanent impairment as a result of the work injuries. Dr. Miskew prescribed continued use of a pain medication and also found claimant not able to work. Although Dr. Miskew indicated claimant was not able to work, respondent's insurance carrier stopped the payment of temporary total disability benefits as of May 25, 1994.

Claimant then filed an Application for Preliminary Hearing requesting temporary total disability benefits and the need for further medical treatment. The preliminary hearing was held on August 4, 1994. The Administrative Law Judge ordered respondent to provide claimant with temporary total disability benefits retroactive to May 25, 1994, and medical treatment with a physiatrist of the respondent's choice. The respondent did not make the

preliminary hearing award of temporary total disability benefits a disputed issue in the final award.

Claimant was seen by physiatrist Vito J. Carabetta, M.D., on September 20, 1994. Dr. Carabetta diagnosed claimant with fibromyalgia pain syndrome and prescribed a regimen of physical therapy. The doctor released claimant on November 3, 1994, with a 11 percent permanent partial functional disability of the body as a whole and permanent work restrictions.

Claimant is married and has three minor children. When respondent's insurance carrier stopped paying claimant temporary total disability benefits in May of 1994, the family was evicted from their home and claimant was forced to move himself and his family to live with his parents in Pittsburg, Kansas. At the time of the regular hearing, February 7, 1995, claimant's wife had fortunately been able to find gainful employment with the local Pittsburg, Kansas, school district.

Claimant testified he did not contact the respondent for accommodated employment after he was released by Dr. Carabetta with permanent restrictions. One of the reasons he did not get in touch with the respondent was because the respondent's Vice President, Russ Miller, had told him in March of 1994, after he had learned that claimant had hired an attorney to represent him in the workers compensation matter, that he was going to now play "hard ball" with the claimant. Also, Mr. Miller angrily told claimant not to set foot or come on respondent's property until this thing was over. Carol Carver (Breneman), office manager for the respondent, testified that during a February 16, 1995, unemployment hearing, she offered claimant a job that would accommodate his restrictions, but claimant did not contact her in reference to that offer.

Claimant acknowledged he was offered an accommodated job with the respondent by Ms. Carver during the unemployment hearing. He testified he could not accept that job because he had been forced to relocate his family to Pittsburg due to his injuries and his wife now had secured a good job that was helping to provide for the family. Claimant testified it was impossible for him to commute the 120 miles one way from Pittsburg to Kansas City to attempt the offered job. Claimant also testified he would not again uproot his family to move back to Kansas City.

The Appeals Board concludes, under the circumstances of this case, it was not unreasonable for claimant to refuse to attempt to perform an accommodated job offered by respondent in February of 1995. This conclusion is supported by the fact that claimant was required to relocate his family to Pittsburg, Kansas, because of his work-related injuries when respondent's insurance carrier stopped paying claimant temporary total disability benefits at a time when he was not able to work. It was impractical for claimant to commute from Pittsburg to Kansas City because of the distance. It was also impractical and unreasonable to require the claimant to relocate himself and his family back to Kansas City when claimant's wife had secured a good job in Pittsburg that was needed for the family's support. Under these circumstances, the Appeals Board finds the principles as announced

in Foulk do not apply because claimant's conduct does not rise to the level of bad faith or an attempt to wrongfully manipulate the workers compensation system.

The Appeals Board will next address the question of whether claimant made a good faith effort to find appropriate employment as required by Copeland.

The regular hearing was held on February 7, 1995, and the continuation of that hearing was held on February 13, 1995. At that time, claimant was not employed. He testified, however, he was seeking employment and that he wanted to work. He also testified he remained symptomatic which minimized the number of jobs he was able to perform. Claimant testified he applied at a hair salon for a cleaning job, at his father's church for a janitor job, at a grocery store, and he was making a continuing effort to apply for work. Based on that testimony, the Appeals Board finds claimant has made a good faith effort to find appropriate employment and he expressed a sincere desire to continue the effort to find employment within his permanent work restrictions.

Accordingly, since claimant did not unreasonably refuse to attempt an accommodated job offered by the respondent and he further made a good faith effort to find appropriate employment, the Appeals Board concludes claimant is entitled to a 100 percent wage loss based upon the difference in his actual pre- and post-injury wages.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that its November 27, 1996, Order is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
James K. Blickhan, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director